

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 2, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-2452

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**ROSIE M. BENZ (DECEASED) BY
CAROL BAUS,**

PLAINTIFF-APPELLANT,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION,
EXCEL BUS LINE, INC., AND
AETNA CASUALTY & SURETY CO.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS P. DOHERTY, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Carol Baus, guardian for and daughter of Rosie M. Benz (deceased), appeals from a judgment entered affirming the Labor and Industry Review Commission's determination that Benz's terminal heart attack

was not work-related. Baus claims that LIRC's decision should be reversed because it was based on Dr. Laurence D. Hutchinson's opinion, which was rendered without considering certain pertinent facts regarding Benz's recent medical condition and weather conditions. Because the record is unclear as to whether Dr. Hutchinson considered these pertinent facts and because Dr. Hutchinson's opinion was the basis for LIRC's order, we reverse the judgment and remand this case to allow Dr. Hutchinson the opportunity to reconsider his opinion in light of the pertinent facts.

I. BACKGROUND

Benz was employed by Excel Bus Line, Inc. as a school bus driver. She drove a small bus that transported three commuter students. Benz was forty-five years old at the time of this claimed work injury. On January 17, 1994, she was performing her duties as a bus driver when she apparently sustained an acute myocardial infarction. She managed to pull the bus over and stop before passing out. She was transported to St. Joseph's Hospital, where she was declared dead.

Two days prior to the incident, Benz had been treated at John Doyne Hospital for difficulty breathing, cough, yellow thick expectorant, sore throat, chest aching and rib pain. She was diagnosed with bronchitis. Despite the illness, Benz went to work on the day of the incident, which also happened to be a severely cold January day. The temperature was 35° below zero.

After Benz's death, Baus, in her capacity as guardian, applied for worker's compensation benefits for Benz's estate. A hearing was held on October 12, 1994, and September 28, 1995. Two physicians provided testimony via WC-16B reports: Dr. Hutchinson and Dr. Salvador Del Rosario. Dr. Hutchinson opined that:

[t]o a reasonable degree of medical probability, given the information provided in these records, I found no evidence that anything in the workplace substantially affected the development of her atherosclerosis or its eventual outcome in her. Instead her own risk factors were what accelerated and aggravated its progression.

Benz's risk factors included smoking, obesity and diabetes.

Dr. Del Rosario testified in pertinent part:

[w]hat Dr. Hutchinson overlooked was that this incident occurred on one of the coldest days of the year and Ms. Benz was having breathing problems which precipitated her condition.... Had she not been working on the coldest day of the year driving numerous students to school in all probability she would be alive today.... Stress [and] weather contributed to early onset.

The Administrative Law Judge concluded that:

the applicant died of an acute myocardial infarction. There is no clear showing that the applicant suffered from occupational stress or that stress aggravated her pre-existing condition.... There is no clear indication that the weather in any way contributed to the onset of the applicant's acute myocardial infarction.... Since I do not find any aggravating factors in the applicant's work exposure, I must find the opinion of Dr. Hutchinson to be most credible.

LIRC affirmed the ALJ, reasoning that:

there was no clear showing that the applicant suffered from occupational stress or that stress aggravated her preexisting condition despite the cold weather at the time of her death.... Based on the medical evidence in the record, including Dr. Hutchinson's report, and given the applicant's personal risk factors, the evidence was sufficient to establish that there was a legitimate doubt that the applicant suffered her myocardial infarction as a result of work-related stress or that her work exposure aggravated and accelerated her preexisting condition beyond its normal progression.

The circuit court affirmed the LIRC. Baus now appeals.

II. DISCUSSION

Baus argues that LIRC's decision should be reversed because it relied on Dr. Hutchinson's opinion, which was not based on all the pertinent facts. Because of this, Baus contends that LIRC's determination lacks credible factual support. LIRC argues that the record contains substantial credible evidence to support its ruling and therefore, we should affirm.

Our review of LIRC's decision is governed by statute and is limited in scope. *See R.T. Madden, Inc. v. DILHR*, 43 Wis.2d 528, 536, 169 N.W.2d 73, 76 (1969). The limitations of our review are set forth in § 102.23(1), STATS. *L & H Wrecking Co., Inc. v. LIRC*, 114 Wis.2d 504, 508, 339 N.W.2d 344, 346 (Ct. App. 1983). We will affirm the findings of the LIRC if there is any credible evidence in the record to support the findings. *See id.* However, we may "set aside the commission's order or award and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence." Section 102.23(6), STATS.

We conclude that this case is appropriate for remand. Dr. Hutchinson's opinion cannot be considered credible if it is not based on all the facts. *See Dreher v. United Commercial Travelers*, 173 Wis. 173, 178-79, 180 N.W. 815, 817 (1921). Here, the record demonstrates that Dr. Hutchinson did not consider Benz's pertinent medical history in combination with certain weather conditions in rendering his opinion. It may be that Dr. Hutchinson's opinion regarding the cause of death will not be impacted by these factors. Nonetheless, the record contains another physician's opinion, Dr. Del Rosario's, which asserts these factors did cause Benz's heart attack and that Dr. Hutchinson overlooked

these factors in reaching his conclusion. There is nothing in the record refuting Dr. Del Rosario's opinion. Accordingly, we cannot conclude that Dr. Hutchinson's opinion constitutes credible and substantial evidence to support LIRC's decision.

This case does not present a situation where two physicians simply have conflicting opinions as to the cause of death. If that were the case, we would be bound by LIRC's determination affording more weight and credibility to Dr. Hutchinson's testimony over Dr. Del Rosario's. *See Semons Dep't Store v. DILHR*, 50 Wis.2d 518, 528-29, 184 N.W.2d 871, 876 (1971). The record, however, reveals that Dr. Hutchinson apparently did not know of Benz's recent medical history and did not consider the possible effect of the severely cold weather. Dr. Del Rosario, having considered these factors, not only concluded that the weather contributed to Benz's heart attack, but also that Dr. Hutchinson reached a contrary conclusion *because* Dr. Hutchinson was not provided with this information. Under these circumstances, Dr. Hutchinson's opinion may be faulty, and therefore there is insufficient credible evidence to support LIRC's determination. Before LIRC can rely on Dr. Hutchinson's testimony, Dr. Hutchinson must be provided with all the pertinent facts upon which to base his opinion.

We remand this case to the circuit court and instruct it to vacate its judgment, and remand the matter to LIRC to conduct proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

